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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

BURBANK KAWASAKI, INC.,

Protestant,

v.

KAWASAKI MOTORS CORP., U.S.A., a
Corporation,

Respondent.

Protest No. PR-2328-12 and PR-2333-12

**RESPONDENT KAWASAKI MOTORS
CORP., U.S.A.'S POST-HEARING BRIEF
ON REMAND**

***[REDACTED TO REFLECT
INFORMATION UNDER SEAL]***

I. INTRODUCTION

Protestant, Burbank Kawasaki, Inc., ("Protestant" or "Burbank") argued at the New Motor Vehicle Board ("Board") meeting on July 25, 2013 that having a line of wholesale credit ("flooring" or "floor plan") would cure all of its breaches of the Kawasaki Authorized Dealer Sales and Service Agreement ("Dealer Agreement"), which breaches were determined to collectively constitute "good cause" for termination by ALJ Prod after the first merits hearing on this matter in February 2013. In fact, counsel for Burbank represented to the Board, "Obviously, if the flooring were in place, we can get the units in stock and sell the units and be back in business as usual." (Board Meeting Transcript at 18: 10-12) (Exh. A). He also said,

1 Inventory is what will change that. This dealer is well known in
2 Burbank and has been there a long time. The public knows the
3 dealership is there. *If we have the inventory, we can sell the*
4 *inventory. One of the problems we had, and reason these sales*
5 *figures are poor and consumers were going outside the market to*
6 *buy is because we didn't have them.*

7 (*Id.* at 43: 10-17) (emphasis added). Finally, counsel for Burbank represented to the Board,

8 *Flooring will cure those issues. It will, by necessity. All three are*
9 *intertwined: If you don't have flooring, [you] can't stock units. If*
10 *you can't stock units, you can't sell units. Simple as that. All*
11 *we're asking for is a chance to do that.* It is just with this protest
12 pending, you are not going to be able to get flooring; not going to
13 happen.”

14 (*Id.* at 46:23 – 47:6) (emphasis added).

15 Based on Burbank's representations, the Board gave it another chance, rejected ALJ
16 Prod's Proposed Decision and remanded the case back to ALJ Carlson for further evidence on
17 flooring and sales issues. Burbank's position on remand, however, would soon establish that the
18 chance given by the Board to allow Burbank to meet its contractual obligations was not
19 warranted.

20 In a stunning about-face at the remand hearing held on September 17 and 18, 2013,
21 Burbank completely changed its position. It now argues that Burbank does not need to change
22 anything – it is doing as well as it can (currently an abysmal 17.3% of expected sales), does not
23 need to perform at a higher level and will never meet its contractual obligations to obtain
24 adequate flooring, stock adequate inventory or to make adequate sales. It conceded that for the
25 first time in 15 to 20 years, it no longer maintains a warehouse in which it can stock an adequate
26 inventory of units, and now contends that it only has to stock the motorcycles (10 to 12 units) that
27 will fit into its small showroom, which it estimates to be about half the size of the Board's hearing
28

1 room. (RTR, 335:21 – 336:7).¹ Further, Burbank stated that if it obtains floor plan financing, it
2 will not be in the contractually required amount, but will rather be in an amount well below the
3 minimum flooring as determined by the formula followed by Kawasaki for similarly situated
4 Kawasaki dealers. The most telling and contradictory admission was made by Burbank’s owner,
5 Mr. Leon Bellissimo, who testified that in the past 24 months, *Burbank had not lost a single sale*
6 *due to a lack of flooring* (RTR, 384:12 – 18) *or lack of inventory* (RTR, 348:24 – 349:3)
7 (emphasis added). In short, Burbank no longer claims that it can obtain a level of flooring that
8 will allow it to stock sufficient units to perform at a reasonable level, as it represented to the
9 Board in July, but now rather seeks to obtain exemptions from its contractual (and statutorily
10 recognized) flooring, inventory, and sales obligations.

11 Respondent, Kawasaki Motors Corp., U.S.A., (“Kawasaki”) addressed, at the remand
12 hearing, the issues identified by the Board in its Order by demonstrating that it uniformly applied
13 the same criteria applied to all Kawasaki dealers to establish the required amount of floor plan
14 financing for Burbank (and that Burbank should have had in place for the last 2½ years), the
15 inventory that Protestant is required to carry and the expected sales that Protestant should achieve.

16 On the other hand, Burbank did not refute these contractual requirements. Instead,
17 Burbank simply wishes to have the Board find these requirements not applicable to it and to
18 declare that its current lack of flooring, dearth of inventory and dreadful sales performance are
19 acceptable, without any further change or effort on its part. Based on these admissions, the
20 fundamental premise on which the Board issued the remand Order has been discredited, and the
21 original Proposed Decision written by ALJ Prod, finding that Kawasaki had good cause to
22 terminate Protestant’s Kawasaki Dealer Agreement, should be reinstated and adopted.

23 If, however, the Board still believes that a conditional order is appropriate, the Board
24 should direct Protestant to comply with its Dealer Agreement and to obtain at least the full
25 amount of minimum required floor plan financing (\$885,219), stock the required inventory (116
26 motorcycles and 2 ATVs) and sell a number of units (232 motorcycles and 5 ATVs) that would

27 _____
28 ¹ Citations to the record at the Hearing on Remand are cited as “RTR.” Citations to the first
merits hearing are cited “RT.”

1 allow it to perform at the level of an average Kawasaki dealer transacting the average amount of
2 sales when compared to the sales that are available, as demonstrated by Kawasaki at the remand
3 hearing.

4 **II. FACTS**

5 A. Prior Proceedings.

6 On January 24, 2012 Kawasaki sent, and Protestant Burbank received, a Notice of
7 Termination in compliance with Vehicle Code 3060. In that Notice of Termination, Kawasaki
8 identified 4 independent reasons for the termination of Protestant's Dealer Agreement (in breach
9 of the paragraphs of the Dealer Agreement cited in parentheses):

- 10 (1) Failure to maintain adequate model inventory (Paragraph 15),
11 (2) Failure to meet sales requirements (Paragraph 5),
12 (3) Failure to provide equal representation of Kawasaki Products (Paragraph 11) and
13 (4) Failure to maintain floor plan financing adequate to fulfill its obligations under the
14 Dealer Agreement (Paragraph 14).

15 Protestant filed a timely protest. On February 5, 6 & 7, 2013, a hearing was held on
16 Protestant's protest. ALJ Prod issued a Recommended Decision on May 23, 2013, in which he
17 determined that Kawasaki had established good cause for the termination of Burbank's Kawasaki
18 Dealer Agreement, pursuant to Vehicle Code Section 3061.

19 On August 6, 2013, the Board issued an Order rejecting the Proposed Decision (which
20 decision it had announced at its July 25, 2013 Meeting), stating it sought to avoid a "forfeiture"
21 and remanding the matter for further fact finding, so that "the Board will be in a better position to
22 determine whether to issue a decision pursuant to Section 3067." Consistent with that Order, on
23 August 27, 2013, ALJ Carlson ordered the parties to address five issues:

- 24 (1) The amount of floor plan financing that Burbank should have;
25 (2) A time frame in which Burbank should be required to obtain that level of financing;
26 (3) The number of Kawasaki units that Burbank should have in stock to have a complete
27 line of products;
28 (4) The level of sales that Burbank must achieve to meet its contractual obligations; and

1 (5) Burbank's contractual obligations with regard to each of these issues.

2 B. Hearing on Remand.

3 On September 17-18, 2013, ALJ Carlson took additional evidence on these issues from
4 Leon Bellisimo (dealer principal of Burbank), Bruce Gill, Regional Business Director, Kawasaki,
5 and Martin Keller, Senior Regional Credit Supervisor, Kawasaki Motors Finance Corporation
6 ("KMFC").

7 1. Protestant's Market.

8 Protestant was appointed as a Kawasaki dealer in 1978 in Burbank, California. The City
9 of Burbank is one of the 88 cities that comprise Los Angeles County. Since the 1980 Census, two
10 years after Protestant was appointed a Kawasaki dealer, Los Angeles County has grown by over
11 2.5 million people, or over 33%. (Exh. RR4). In fact, at the time of the 2010 U.S. Census, the
12 population of Los Angeles County was over 9.8 million – making it the most populous county in
13 the United States and more populous than 42 individual states. (Exhs. RR5 & 6). The current
14 population of Los Angeles County is estimated to be more than 10 million. (Exh. RR 5). Not
15 surprisingly, this is a large and important market for Kawasaki and for the motorcycle and ATV
16 industry in general. (RTR, 91:2 - 13).

17 Conversely, Burbank has been located in the same facility since it was appointed and has
18 never expanded the square footage of its facility. (RT I, 18:10 – 193). In fact, Burbank has
19 recently *reduced* its ability to carry an appropriate inventory – as it decided to get rid of a
20 warehouse where it previously stored a representative number of Kawasaki motorcycles and
21 ATVs – a warehouse that it had used for approximately 20 years. (RTR, 129:5-7; RTR, 379: 23 –
22 380:12). Further, Burbank has made it clear that, unlike the 85% of metro market dealers in
23 California that maintain off-site storage (RTR, 126: 11 – 23), it will no longer utilize any such
24 off-site warehouse for that purpose. (RTR, 345:4 – 5). As such, Burbank has admitted that it is
25 voluntarily and severely limiting its own ability to store an adequate inventory and to make an
26 adequate number of sales.

2. Floor Plan, Inventory and Sales Requirements.

Kawasaki sets Burbank's minimum floor plan financing requirements pursuant to a formula that is applied uniformly to all dealers. (RTR, 135:18 – 21). The formula is a mathematical calculation based on the sales expectancy of the dealership at national average, inventory requirements and the average cost of Kawasaki motorcycles. (RTR, 134:22 – 135:9). No Kawasaki dealer is granted a lower minimum floor plan requirement because of the dealer's long-standing tenure as a Kawasaki dealer or because the dealer unilaterally determines that it does not wish to carry the required level of inventory. Instead, in California 85% of dealers have floor plan credit *in excess* of the minimum Kawasaki requires and most of the dealers that are below the requirement are very close to being in compliance. (Exh. RR9)

Likewise, Kawasaki's inventory requirements are set based on sales expectancy. (RT II, 122:3- 21; RTR, 116:2 - 7). Moreover, the evidence showed that inventory is a critical part of a dealer's ability to make sales, as Burbank itself admitted to the Board at the July 25 meeting, "If you can't stock units, you can't sell units. Simple as that." (Board Hearing Transcript at 43: 10-17; 46:23 – 47:6). Kawasaki presented evidence at the hearing that a dealer should, at the time of peak demand, in February and March, have about 50% of its annual expected sales amount in inventory. (RT II, 122:3 – 21; RTR, 116:2 – 7).

Protestant's sales performance is measured on a comparison of its sales anywhere in the United States compared to the number of sales made of competitive products within its assigned market area – called by Kawasaki the Statistical Evaluation Area ("SEA"). (Resp. Exh. 325 [SEA for Burbank], RT II, 133: 9-25; Resp. Exh. 314; RT II, 139: 15-17). Protestant's SEA is established using a standard methodology that assigns the most proximate federal government census tracts to the dealer, for purposes of assessing its overall sales performance. (RT II, 133: 24-25, 135: 20-22). This is the same measurement that is applied to all Kawasaki dealers, and is similar to such measurements made by other companies in the motor vehicle industry in order to determine an achievable standard for a dealer's sales. (RTR, 107:3 – 25.) Based on these

calculations, Kawasaki has determined and presented evidence of a reasonable annual sales expectancy for Burbank of 232 motorcycles and 5 ATVs. (RTR, 115:7 – 13)²

III. ANALYSIS

A. The Law of Avoiding “Forfeitures” Does Not Apply.

1. The Process Of Finding Good Cause Eliminates Any Forfeiture Concern.

In rejecting the Proposed Decision, the Board cited a policy in the law of avoiding forfeitures. (Order of Remand at 2). Generally, California law does seek to avoid certain types of forfeitures, if appropriate payment is made to the party harmed. *See, e.g.,* Civil Code § 3275. These forfeitures are usually damages or penalties or losses of rights that are not proportional or appropriate compared to the breach or offense that a party has committed, in situations *in which the relationship between the parties is not regulated*. *Smith v. Allen* (1968) 68 Cal. 2d 93 In situations where the relationship between the parties is regulated by statute, however, any *additional* concern about forfeiture is not appropriate. *Smith v. Allen, supra* 68 Cal. 2d at 96 (“[a] comprehensive legislative scheme . . . provide[s] adequate protection . . . against forfeitures”). In *Smith*, the court held that because the default on the purchase of real property was under a deed of trust, the statutory scheme provided the vendee ample opportunity to protect against what might otherwise might be seen as a forfeiture. *Id.*

In this case, the relationship between the parties is heavily regulated by the Vehicle Code.

² Mr. Bellissimo testified that Burbank had “won” a contest regarding sales of Kawasaki units, in which dealers get points both for sales made, as well as for other information obtained from customers, such as phone number and e-mail address. The contest ran for five months, from April 1 through August 31, 2013 and Burbank made only 20 Kawasaki sales in that 5 month period. (RTR, 93:14 – 25) *That is an average of 4 sales per month, or 48 sales per year.* In that contest, Burbank, despite being in the largest market in the West Region, was “competing” against some of the smallest – market Kawasaki dealers, and Burbank’s objective for the contest was set at the lowest standard – 25 points. The objective for the contest had nothing to do with the expected sales Burbank should have achieved had it been performing at a national average level for its market. (RTR, 91:14 – 93:13) Given Burbank’s combined motorcycle and ATV annual sales expectancy at national average of 237, it should have sold 99 Kawasaki units in the five month period of the contest. Burbank still ranks as the worst performing motorcycle dealer in the Kawasaki West Region, based on expected sales. (RTR, 115:17 – 25)

Kawasaki is required under Section 3060 to give a very specific notice of termination, to participate in a hearing under Section 3066, and under Section 3061, to demonstrate “good cause” to the Board before it may terminate its contract with Burbank. This burden imposed on manufacturers works to avoid terminations based on immaterial or insubstantial breaches of dealer agreements, and sets forth the factors that this Board must consider before finding good cause. Vehicle Code § 3061 (a) – (g). Any imposition of an additional or higher standard by the Board, based on some amorphous desire to avoid a “forfeiture” for a dealer for which the manufacturer has already demonstrated good cause for termination, exceeds the power of this Board, given the statutory protections already in place to avoid a forfeiture. *Smith, supra*.

Furthermore, even in cases in which a statutory scheme does not exist, the law requires that the breaching party make full compensation to the non-breaching party – the forfeiture arises from a penalty or loss that exceeds the damage that the non-breaching party incurred. *See, e.g., Atkins v. Anderson* (1956) 139 Cal. App.2d 918, 920 (citing Civil Code Section 3275). Here, Protestant has not offered to compensate Kawasaki for the losses of sales and customers that Kawasaki has endured while Protestant has ignored its contractual obligations. Since the unrefuted evidence demonstrated that Burbank has been below 41.4% of average performance since at least 2008 and is now below 20% of average, the amount owed by Burbank would be substantial. Kawasaki estimates it has lost more than 964 sales since January, 2008 due to Burbank’s failure to perform its sales obligations effectively. (Resp. Exh. 319-322; RR-3)

2. No Forfeiture Could Occur – Protestant Admitted that Its Performance Was Not Impacted By Its Loss Of Floor Plan Financing and Lack of Inventory.

In its Order on Remand, the Board ruled, based on arguments made by Burbank at the July 25, 2013 Board meeting, that Protestant’s ability to meet Kawasaki’s sales and inventory requirements had been solely caused by Protestant’s lack of floor plan financing. (Order of Remand at 2-3). In other words, the Board’s Order was based on the premise that if Protestant only had the opportunity to obtain adequate floor plan financing, Kawasaki’s other legitimate

1 contractual concerns would be cured as well.

2 Protestant's testimony at the hearing on remand, however, was completely the opposite of
3 its argument at the Board Meeting on July 25. Mr. Bellissimo, Protestant's dealer principal,
4 testified that his dealership has not lost *any* sales because of the lack of flooring (RTR, 384:12 –
5 18) or because of lack of inventory (RTR, 348:24 – 349:3). In addition, Protestant was unabashed
6 in its position that it would never live up to its contractual obligations – for the minimum required
7 flooring amount, required inventory levels or adequate sales performance. Rather, Protestant's
8 position is that it is a small dealer in a large market that should be entitled to continue as it has (in
9 material breach of its dealer agreement), and that Kawasaki's "remedy," if it desires to achieve
10 national average sales in Burbank's SEA, is simply to appoint another dealer in the market.³
11 (RTR, 8:17 – 18; 477:3 – 6). In short, Kawasaki has shown that it has good cause to terminate its
12 Dealer Agreement with Protestant, and any "concern" about a forfeiture is not warranted.

13 B. Scope of Board's Authority To Issue A Conditional Decision Requires That It
14 Base That Decision On The Kawasaki Dealer Agreement, As Supported By Substantial Evidence.

15 1. The Kawasaki Dealer Agreement Governs The Issues On Remand.

16 The Board has directed that the ALJ, in addition to making the requested factual findings,
17 to make "recommendations as to conditions that would be appropriate under Section 3067."
18 (Order at 3). Under Veh. Code Section 3067, the Board "... shall sustain, conditionally sustain,
19 overrule, or conditionally overrule the protest. *Conditions imposed by the board shall be for the*
20 *purpose of assuring performance of binding contractual agreements between franchisees and*
21 *franchisors or otherwise serving the purposes of this article.*" (emphasis added). Hence, while
22 the legislature has given the Board the authority to issue a conditional order, that grant of power
23 also limits the Board's role to enforcing binding contractual provisions – it is not authorized to re-

24 ³ This suggestion, of course, is completely absurd. Since Burbank makes less than 20% of its
25 expected sales, Kawasaki would have to appoint 4 more such dealers to approach 100% of
26 national average of sales in the market. Further, any effort to appoint an additional dealer would
27 likely be subject to protest from some number of Kawasaki dealers in Los Angeles County. (As
28 counsel for Burbank pointed out, it is undisputed that Kawasaki already has 18 dealers in LA
County, the most in the industry. (RTR, 8:22 – 9:2)). Moreover, asking one or more new dealers
to take on the investment of opening a new dealership just so that Burbank can continue to
underperform and ignore its contractual obligations and duty to the public for some unknown
period of time makes no sense. (RTR, 150:20 – 152:6)

1 write the contractual terms between the parties. *See, BMW of North America v. New Motor Veh.*
2 *Bd.* (1984) 162 Cal. App. 3d 980, 994.

3 All of the issues that the Board has ordered be addressed on remand are governed by the
4 terms of Protestant's Kawasaki Dealer Agreement. (Resp. Exh. 303). Therefore, any conditional
5 order that the Board intends to issue—which Kawasaki believes would be inappropriate in light
6 of: (a) the multiple, persistent breaches that Burbank has already committed and (b) Burbank's
7 admission that its abysmal sales performance is *not* the result of its lack of floor plan financing or
8 inventory – must comply with the terms of the Kawasaki Dealer Agreement. The Board simply
9 lacks the authority to amend the terms of that Agreement. *See BMW, supra.* (Board exceeds its
10 jurisdiction if it purports to rewrite the terms of the franchise agreement). As a result, all of the
11 findings on the issues to be considered on remand must comport with Burbank's current
12 contractual obligations under its Kawasaki Dealer Agreement, and any recommended conditions
13 must reflect those existing contractual requirements.

14 2. Any Conditional Order Requirements Imposed By The Board Must Be
15 Supported By Substantial Evidence.

16 Furthermore, any conditions imposed by the Board must be based on the evidence that
17 was presented at the two hearings on the merits, as any decision will be subject to review by the
18 Superior Court on a substantial evidence standard. Code Civ. Proc. § 1094.5(c); *Kawasaki*
19 *Motors Corp. v. Superior Court* (2000) 85 Cal. App. 4th 200, 205; *British Motor Car*
20 *Distributors, Ltd. v. New Motor Vehicle Board* (1987) 194 Cal. App. 3d 81, 90. At the hearing on
21 remand, the parties presented evidence to support their respective positions with regard to floor
22 plan financing, inventory and future sales, which, not surprisingly, were vastly divergent – and
23 this was the *only* evidence offered.

24 For example, Burbank presented Mr. Bellissimo's testimony, based solely on his opinion,
25 that \$80,000 to \$125,000 was sufficient flooring for Burbank. (RTR, 357:2 – 10; 358:16 – 18).
26 Conversely, Kawasaki presented evidence that \$885,219 in flooring was required according to the
27 uniformly applied formula for all of its dealers in California, as provided in the Kawasaki Dealer
28 Agreement, Section 14.A. (RTR, 140:6 – 141:24; Exh. RR8; Exh. R-303). Further, 85% of those

1 California dealers exceed the minimum required flooring. (Exh. RR8). After the February merits
2 hearing, ALJ Prod found that “KMC was not unreasonable in setting the required flooring at
3 \$765,000 - \$848,000” based on KMC’s formula as applied in 2011, and also found that
4 “Protestant had maintained, and used, flooring line credit above those levels for quite some time
5 prior to the suspension [of Burbank’s line of credit in June 2011]” (Proposed Decision, ¶ 78)

6 Similarly, Mr. Bellissimo testified that its inventory requirements should be limited to the
7 10 to 12 motorcycles and ATVs that Burbank can fit into its small showroom. (RTR, 337:21 –
8 336:7) Kawasaki presented evidence that Burbank had a warehouse where it stored inventory for
9 the past 15 to 20 years, as admitted by Mr. Bellissimo on cross-examination. (RTR, 129: 5-7;
10 RTR, 379:23 – 380:12). Further, Kawasaki presented unrefuted evidence that in order to meet a
11 reasonable average national standard for sales, Burbank would need to have at the peak of the
12 selling season, 116 motorcycles and 2 ATVs in inventory, (RTR, 116:2-7; 125:2 – 8), which
13 Burbank previously stored in its warehouse. (RTR, 342:8 – 14).⁴

14 Finally, Mr. Bellissimo testified that based on an inventory of 8 to 12 motorcycles and one
15 or two ATVs (and units he believed he could obtain from other dealers and spot orders from
16 Kawasaki), Burbank could expect to sell between 50 and 120 motorcycles and ATVs annually.
17 (RTR, 52:12 – 19). Kawasaki’s Mr. Gill testified that any sales achieved by Burbank on that
18 insufficient level of inventory would be at the lower end of that grossly unacceptable range, as the
19 inventory would be insufficient to achieve much more and units are not as easy to obtain as Mr.
20 Bellissimo testified. (RTR, 119:7 – 120:13). Further, Burbank’s recent sales performance of 4
21 units per month from April through August would project to an annual sales rate of 48 units.
22 (RTR, 92:11 – 93:25) In addition, Mr. Gill testified that Burbank’s expected sales – given the
23 current trend of increasing sales – applying its formula uniformly applied to all dealers, which is

24
25 ⁴ Protestant argued that inventory sat in its warehouse, by which presumably it means that
26 Kawasaki should not require Protestant to meet its inventory requirements. The “reasonableness”
27 of this contractual obligation, however, is underscored by the fact that dealers with which
28 Protestant competes carry floor plans in excess of what Kawasaki requires so that they can carry
more than the required inventory, even if a majority of them need to have a warehouse to store
some of this inventory. Protestant’s prior inability to regularly sell its inventory is completely a
reflection of Protestant’s sales inadequacies (below 40% of expected sales since 2008), not the
inventory requirement imposed upon it.

1 based on a conservative national average standard on sales made in Burbank's Statistical
2 Evaluation Area, was 232 motorcycles and 5 ATVs. (RTR, 113:25 – 115:10; Exh. RR-3).

3 *As demonstrated, each party provided very specific testimony and evidence to support its*
4 *positions on flooring, inventory and sales. For this reason, the Board cannot appropriately "split*
5 *the difference" between the parties' respective positions and come up with its own figures to*
6 *include in a conditional order.* (Furthermore, given the outrageous positions taken by Protestant,
7 any proposed compromise numbers would not reflect any "reasonable" expectation of a dealer
8 under any appropriate standard.) For this additional reason, any conditions imposed on a final
9 order should only be based on the contractual standards presented by Kawasaki.

10 C. Protestant's Only Witness Lacks Any Credibility.

11 Burbank's sole witness was its 100% owner, Mr. Leon Bellissimo. Mr. Bellissimo's
12 testimony was marked by contradictions, inconsistencies, exaggerations and outright falsehoods.
13 In short, his testimony, on which Burbank's case was solely based, was completely lacking in
14 credibility.⁵ A very few examples of Mr. Bellissimo's questionable testimony are as follows:

- 15 • Mr. Bellissimo testified that he has completed and submitted an application for
16 flooring to a company named AFC, and yet did not produce a copy of the
17 completed application, instead moving only a blank application into evidence.
18 (RTR, 59:3 – 13, Exh. RP - 2). It later became obvious that the AFC application
19 was still not complete, because Burbank does not have a current financial
20 statement. (RTR, 386:2 – 10).
- 21 • Mr. Bellissimo could not remember whether he answered the question on the
22 AFC application regarding any pending litigation truthfully, and testified that he
23 did not consider the instant protest to be litigation, saying he didn't sue anyone,
24 despite the fact that his corporation filed the protest. (RTR, 390:7 – 391:21).
- 25 • Mr. Bellissimo testified that he had submitted an application for flooring to either
26 Bank of America or Wells Fargo, but they did not get back to him on whether it
27 was approved, claiming "very bad service." (RTR, 73:12 – 74:12). Mr.
28 Bellissimo testified at the original merits hearing that he had not submitted an
application for flooring (RT I, 65:20 – 23). At the hearing on remand, Mr.
Bellissimo at first claimed that he had submitted an application at one bank
branch but not others (RTR, 73:4 – 17), and later claimed to have been confused
and that he had applied for a home equity loan and not flooring. (RTR, 79:18 –
24). He then tried to equate a home equity loan with flooring and to equate a loan
with a bank account, saying they were all the same thing. (RTR, 80:21 – 83:20).

⁵ ALJ Prod also found that Mr. Bellissimo's testimony was not credible after the first merits
hearing in February 2013. (Proposed Decision, ¶ 80)

- Mr. Bellissimo claimed in testimony under oath to have spoken to 90% of the 1,500 Kawasaki dealers nationwide “over the years” about their inventory, and yet never kept notes about those discussions, but he claimed to remember what they all told him. When pressed on cross-examination, he admitted only to speaking with “a lot of dealers” on the phone and at the annual Kawasaki convention. (RTR, 386:11 – 387:15). He also admitted, however, that he never verified the inventories himself, except for “ten, twenty, thirty” of the dealers. He also that admitted all of this testimony was based on hearsay. (RTR, 388:6 – 22).
- Mr. Bellissimo testified that he “loves” being a Kawasaki dealer, that he is part of the Kawasaki family, and that he is loyal to Kawasaki. (RTR, 362:7 – 363:3). Mr. Bellissimo also admitted, however, that Burbank (through him) has publicly and permanently attacked Kawasaki, its executives and its products. In his post on ripoffreport.com (which will not remove posts once made), Mr. Bellissimo, the dealer principal of Burbank, defamed several Kawasaki executives by name and accused them of being “UNETHICAL – MERCILES[sic] – COWARDS – CORPORATE GREED – FACELESS BACKSTABBERS” and of committing “act[s] of terrorism.” (Resp. Exh. 309) Further, Mr. Bellissimo directly stated on this public website that the Kawasaki products which he has sold for 34 years are unsafe and kill people. Specifically, Mr. Bellissimo stated, “Kawasaki let the BAD times roll. [¶] Many riders are dead do [sic] to possible mechanical failure or factory recall or Kawasaki employee left a paper towel in the engine.” In addition, he pointedly implored the public, “**Please do not support Kawasaki products.**” (*Id.*) (emphasis added). Amazingly, he also admitted he stands behind those comments today. (RTR, 364:23 – 366:16; Exh. 309).

D. Kawasaki Provided Support For Protestant’s Contractual Obligations With Regard To All Of The Issues On Remand.

1. Required Floor Plan Financing.

Under Paragraph 14 of Burbank’s Kawasaki Dealer Agreement, Protestant’s “. . . line of credit shall be of amounts not less than minimum standards established by DISTRIBUTOR from time to time for dealers similarly situated.” Therefore, Burbank has already agreed to be bound by the “minimum standards” for floor plan financing that is set by Kawasaki.

Kawasaki establishes required floor plan financing levels using a standard calculation that is applied to all dealers across the nation. (RTR, 135:18 – 21). That calculation is based the Dealer’s expected sales by segment (in this case motorcycle (MC) and all-terrain vehicle (ATV)) as determined by the Dealer Score Card provided to each dealer by Kawasaki (which is based on the national average of Kawasaki’s percentage of industry sales), multiplied by the average dollar amount per unit based on the most recent 12-month sales history, times 50%, or the

1 higher of the product of that formula or a set minimum for the segment based on minimum
2 model representation. (RTR, 134:22 – 135:9). For Burbank, this calculation is as follows:

3 (2013 Expected MC sales) ---- 232 multiplied by

4 (Avg. wholesale price/MC) ---- \$7200

5 Subtotal ----- \$1,670,400

6 Multiplied by 50% ----- \$835,200

7 Set minimum ATV flooring --- \$50,000

8 Total ----- \$885,200

9 Under that calculation, Burbank's current minimum required level of floor plan financing for
10 MC and ATV is \$885,219. (Exh. RR 8; RTR, 141:1-3).

11 This calculation has taken into account that Burbank has lost 2 of its lines of Kawasaki
12 products⁶ (neither of which contributed in any significant way to the floor plan totals) and that
13 Kawasaki has changed its ordering method. The increase in Burbank's required floor plan
14 reflects an increase in the wholesale purchase price of Kawasaki vehicles and the improvement
15 in the general market for motorcycles and ATVs, which have increased the number of sales that
16 Burbank is expected to make. (RTR, 141:12 - 24).

17 Contrary to Burbank's claim, the ability to order product more frequently does not mean
18 that Burbank should hold fewer products in inventory, and hence a lower amount of floor plan
19 financing. (RTR, 118:14 – 19). Under Kawasaki's current system, dealers can order product on
20 a bi-monthly basis. (Exh. RR10; RTR, 117:4 - 13). Not every product, however, is available
21 from Kawasaki every two months. (RT II, 126:17 – 22). Given the seasonality of the
22 powersports industry, the production schedules at the Kawasaki factories and the various other
23 factors that make up the ordering process, Mr. Gill explained that a careful dealer plans its orders
24 throughout the year, in order to maximize its potential sales, at the various times of the year that
25 the sales of street bikes, off-road and other products are most likely to be purchased. (Exh.
26 RR10; RTR, 118:20 – 119:6). As Mr. Gill further explained, dealers cannot merely order a

27 ⁶ The New Motor Vehicle Board's jurisdiction in this matter extends to motorcycle and all-terrain
28 vehicle units only, and not to any other Kawasaki Products. Vehicle Code §§ 331, 331.1, 331.2,
and 426.

1 vehicle and expect to receive it the next day. (RTR, 119:7 - 14). Problems associated with a
2 lack of inventory are made more acute when a vehicle is in high demand and short supply. If a
3 dealer has not ordered those vehicles into inventory, they may not be available at all – from
4 Kawasaki or from any other dealer. (RTR, 119:23 – 120:6).

5 In addition, sales of motorcycles and ATVs are still largely “impulse” purchases that
6 require the item to be in inventory to achieve retail sales, as consumers do not want to return to a
7 dealership to purchase a motorcycle or ATV that is not immediately available in a dealer’s
8 inventory. (RTR, 121:21 – 122:15, 21 - 24). In fact, because the sale of Kawasaki products are
9 more likely discretionary purchases, the competition for those sale comes from an array of
10 potential entertainment-related items, such as vacations and big-screen televisions, not just other
11 makes of motorcycles and ATVs. (*Id.*). Burbank admitted that it needed more inventory in order
12 to make more sales in its arguments at the Board meeting in July. (Argument before the Board,
13 43:2 – 17).

14 Moreover, Kawasaki presented evidence of all of the floor plan financing requirements
15 for all of its California dealers. (Exh. RR-8, RTR, 140:6 - 22). As Exhibit RR-8 demonstrates,
16 every Kawasaki dealer’s financing requirements are established under the same formula. (*Id.*)
17 More importantly, Exhibit RR-9 also shows that the amount of financing required by Kawasaki
18 is demonstrably reasonable, as 80 of the 94 Kawasaki dealers in California (85%) choose to
19 obtain financing *in excess* of the minimum amount required by Kawasaki.⁷

20 On the other hand, Protestant’s argument that a “reasonable” amount of floor plan
21 financing is only that which *it can* obtain (\$80,000 to \$120,000)⁸ regardless of Kawasaki’s
22 requirements, bears no relationship to its contractual obligation or its ability to protect the
23 interests of Kawasaki or the consuming public. As Exhibit RR-9 shows, Burbank has the 7th
24 highest floor plan requirement in the state of California. This requirement is not imposed

25 ⁷ In its opening statement, Protestant claimed that 10 dealers had no floor plan requirement. The
26 evidence demonstrated, however, that those 10 dealers listed on Exhibit RR9 had either
27 voluntarily or involuntarily terminated their Kawasaki Dealer Agreements since 2011. (RTR,
28 173: 2- 9).

⁸ Protestant claims that it cannot get financing above this level because of requirement that
KMFC (a third party over which this Board has no jurisdiction) has imposed that Protestant
provide additional collateral to reinstate its floor plan financing. This point is irrelevant.

1 arbitrarily, but rather because Burbank has responsibility for a very large market with
2 tremendous available business and opportunity for sales of Kawasaki products.

3 Conversely, as a review of Exhibit RR-8 demonstrates, of the 24 Kawasaki dealers with
4 flooring requirements less than \$150,000 (as Burbank seeks to have), only 2 of those dealers
5 even sell motorcycles at all (the largest influence on floor plan size), and each has expected sales
6 levels of between 12 and 33, well below the 232 motorcycle sales that Burbank should be
7 making in its market to achieve national average. [TEXT REDACTED TO REFLECT
8 INFORMATION UNDER SEAL]

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14 [TEXT REDACTED TO REFLECT INFORMATION UNDER SEAL]

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23 - CONFIDENTIAL - [TEXT REDACTED TO REFLECT INFORMATION UNDER
24 SEAL]

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26 [TEXT REDACTED TO REFLECT INFORMATION UNDER SEAL] In light of
27 Burbank's contractual obligation and Kawasaki's uniformly applied standard for the calculation
28 of a floor plan requirement, any conditional order by the New Motor Vehicle Board relating to a

1 minimum floor plan requirement should direct Burbank to obtain the full amount of flooring of
2 \$885,219 that Kawasaki has set for it.

3 2. Reasonable Time To Obtain Financing.

4 According to the Kawasaki Dealer Agreement, Burbank is required to have adequate
5 flooring from a satisfactory financial institution in place “at all times.” (Kawasaki Dealer
6 Agreement ¶14). The evidence indicates that Burbank had not until very recently even applied
7 for financing in the time since its floor plan financing was suspended by KMFC. (Burbank
8 offered a blank application to APC into evidence. (Exh. PR 2). While Mr. Bellissimo testified
9 that he had completed an application without an amount of financing requested, the Board still
10 has no written record confirming any effort by Burbank to obtain any financing.)

11 Significantly, Burbank is contractually permitted to obtain floor plan financing with any
12 financial institution acceptable to Kawasaki; it has NO obligation to secure its financing with
13 KMFC. As a result, even if the Board believes that KMFC’s (a non-party) requirement that
14 Burbank obtain an irrevocable letter of credit (ILOC) as collateral to secure its flooring was
15 unreasonable,⁹ Burbank was never required to obtain flooring from KMFC. It was simply
16 required to obtain – and maintain at all times – flooring from a reputable financial institution.
17 (Kawasaki Dealer Agreement ¶14). Yet, it has not, until recently, even applied for such flooring
18 – not after it lost its flooring from KMFC, and not after Kawasaki warned Burbank that its
19 continued failure to have flooring would result in the termination of its dealer agreement.
20 *Burbank has been without flooring for well over two years at this point.*

21 Therefore, Kawasaki objects to the Board giving Burbank any additional time to obtain
22 floor plan financing. Burbank should have applied for flooring before the Notice of Termination

23 ⁹ Although the reasonableness of the lending practices of a non-party are not relevant to this
24 proceeding, Protestant fails to acknowledge that the additional collateral requirement was the
25 result of Protestant’s failure to provide timely financial statements, issues with repayment after
the sale of vehicles (“out of trust” units) and non-cooperation with collateral checks. (RT III, 91:
2-10; RT III, 92: 7-12, Resp. Exh. 306 at KMC983-984).

26 In short, Protestant was the cause of the problem for which it now seeks relief from its obligations
27 to Kawasaki from the Board. In addition, the *blank* application for financing that Burbank
28 offered into evidence demonstrates that *APC also seeks additional security* in the form of
additional collateral and a silent partner or guarantor, both of which Mr. Bellissimo testified he
provided. (RTR, 62:15 – 25 (guarantor), 66:2 – 6 (additional collateral; his home)).

1 was issued. Nevertheless, if any “grace period” is now extended by the Board to allow Burbank
2 to obtain flooring, it should last no more than 2 weeks after the Board’s final order, given that the
3 Board’s Order cannot issue before the Board meeting on November 12 of this year.

4 3. Required Inventory Levels.

5 Under paragraph 15 of the Kawasaki Dealer Agreement, Burbank is required “. . . to
6 maintain an inventory of then available models of Products, which inventory shall at no time be
7 less than the number of Products reasonably established by Distributor after consultation with
8 DEALER.”

9 At the merits hearing in February, Steven Fischer testified that Burbank should, have had
10 a minimum of approximately 100+ vehicles in inventory to be at an “acceptable” level, given a
11 sales expectancy of 202 units and a seasonality factor. (RT II, 120: 17-122: 21; Respondent’s
12 exhibit 325).¹⁰ Since that time, both Kawasaki’s sales and thus Burbank’s sales expectancy have
13 increased to 232 motorcycles and 5 ATVs. Therefore, that figure given by Mr. Fischer, while
14 accurate at the time given, does not reflect Burbank’s *current* inventory requirement. Under
15 Kawasaki’s formula, Burbank is required to have in inventory half of its expected annual sales
16 volume. (RT II, 122: 3 – 21; RTR, 116:2 - 7) Therefore, as Burbank’s expected sales figure for
17 2013 is 237 units (232 motorcycles and 5 ATVs), Burbank should have 116 Kawasaki
18 motorcycles and 2 ATVs in inventory during peak season to meet its contractual obligation in this
19 regard.¹¹ (RTR, 116:2 – 7; 125:2 - 8).

20 Burbank’s argument that Kawasaki’s inventory requirement is too high because of the size
21 of its facility should carry no weight. Many motorcycle dealers in metropolitan markets lack the
22 capacity to display their entire inventory in their dealerships – in fact, roughly 85% of Kawasaki
23 metropolitan dealers have off-site storage, so that they may have inventory at the ready for a to
24 customer view or purchase. (RTR, 126:11 - 23). Similarly, Burbank had off-site storage for

25 ¹⁰ Proposed Decision, ¶92; ALJ Prod determined that Burbank with 11 units at the time, “does not
26 maintain an inventory even remotely adequate” in order to comply with the contractual
27 requirements based on the relevant expected sales information that was introduced by Kawasaki
28 and reviewed during the February merits hearing.

¹¹ Note that Burbank has had more than 125 units in stock and has used over \$1 million in
flooring at various times in the past 5 to 7 years, when Kawasaki motorcycles and ATVs were
less expensive than they are today. (Exhs. R - 315 – 318, 330; Proposed Decision ¶74).

1 Kawasaki products for the most recent 15 to 20 years that it has been a Kawasaki dealer. (RTR,
2 379:23 – 380:12).

3 4. Future Sales Requirements.

4 Under paragraph 5 of the Kawasaki Dealer Agreement, Kawasaki may evaluate Burbank's
5 sales performance under such criteria as Kawasaki may determine appropriate. (Resp. Exh. 303)
6 One of the methods commonly used in the industry, and that Kawasaki has used to evaluate
7 Burbank in the past, and in part on which Burbank's Notice of Termination was based, is a
8 comparison of the ratio of Kawasaki products sold by Burbank compared to the sales of
9 comparable products in its SEA to the ratio of such sales achieved by other Kawasaki dealers
10 nationally.¹² As was established in the first hearing and on remand, the national standard
11 comparison is the most generous to Burbank, as Kawasaki dealers in the District and Region in
12 which Burbank is located proportionately sell more Kawasaki products than Kawasaki dealers
13 across the nation. (RTR, 107:14 – 21; RT I, 147: 13-148: 3). Therefore, Burbank's contractual
14 compliance with this requirement is usually assessed in light of past sales.

15 In order to comply with the Board's Order to project what future sales that Burbank must
16 achieve in order to fulfill its contractual obligations, Kawasaki has projected sales expectation
17 numbers based on the actual proportional sales of dealers nationally during the period of 2008 to
18 the present. Using that historical data, Kawasaki demonstrated that the number of Kawasaki
19 products that Burbank would need to sell in order to meet the performance of an average
20 Kawasaki dealer is at least 232 motorcycles per year. (RTR, 113:25 – 114:4, 115:7 -13). (ATV
21 expected sales are an additional 5 units per year. (Exh. RR3)). A projected increase in sales
22 expectancy is consistent with Kawasaki's sales growth over the studied period. Therefore, the
23 expected sales figure of 232 is conservative, given the upward sales trend in the past few years
24 and the improving economy. (RTR, 115:11 – 13).

25
26 ¹² Administrative tribunals in other states have also made comparable findings with regard to
27 Kawasaki's sales effectiveness standard. E.g., *Nissan N. Am., Inc. v. Love Nissan, Inc.* (Fla. DAH
28 July 14, 2005), No. 04-2247 at 14, adopted as final order, No. HSMV-06-379-FOF-DMV, (Fla.
DHSMV Apr. 12, 2006) ("Historically, by case law, and by expert testimony in the instant
proceeding, it is found that Nissan's method for evaluating its dealers' sales performances is a
reasonable, industry-accepted practice for evaluating new car dealers.").

1 Burbank, however, seeks an exemption from those sales requirements, which are required
2 of every other Kawasaki dealer in the United States. In effect, Burbank seeks to be allowed to
3 continue as “a *small* fish in a *big* pond.” No support exists for such an exemption under either the
4 Kawasaki Dealer Agreement or under Vehicle Code Section 3061(a), which requires this Board
5 to consider the amount of business transacted by the franchisee compared to the business
6 available to it. At less than 20% of its expected sales, (Exhs. RR 1-3), and currently averaging 4
7 sales per month (RTR, 93:14 – 25), Burbank cannot be allowed to continue on as it has.

8 Protestant argues that it should not be held to these contractual standards of performance
9 because the Kawasaki Dealer Agreement also contains “best efforts” language. This language,
10 however, does not negate the means by which Kawasaki is entitled to measure the dealer’s “best
11 efforts.” In fact, the Kawasaki Dealer Agreement (Resp. Exh. 303) measurement of dealership
12 performance contained in paragraph 5¹³ is consistent with the first factor in determining “good
13 cause” for termination under Section 3061 – the sales of the dealer compared to the business
14 available to it. Protestant’s effort to avoid improving its sales beyond 20% of the expected
15 amount for its market, based on its representation that it is making its “best efforts” should be
16 rejected by the Board.

17 Moreover, as with the floor plan requirement, any decision by the Board to decrease the
18 sales expectation for Protestant would not only change the contractual obligation between the
19 parties, but would arbitrarily place Burbank in a better position than the other Kawasaki dealers
20 with which it competes. Any “break” given to Burbank on the minimum flooring and sales
21 expectancy requirements would also be exceeding unfair, as this would place a heavier burden on
22 the surrounding Kawasaki dealers.

23 Protestant makes no claim that it even has the capacity to meet its contractual obligations.
24 Rather, it seeks a special exemption from those requirements because of the length of time that it
25 has been a Kawasaki dealer and the size of its facility. Protestant posits that rather than terminate
26 it for its inability to serve the community in which it sits, Kawasaki should just appoint more

27 ¹³ Paragraph 5 of the Dealer Agreement states that Kawasaki may evaluate a dealer’s performance
28 based on, among other possible standards, “...the ratio of sales of Products by Dealer to sales of
other makes of similar products as compared ... on a local, state or nationwide basis....”

dealers! If those dealers were allowed to perform as Burbank has performed (20% of expected sales based on national average), Kawasaki would have to appoint 4 new dealers in Burbank's Statistical Evaluation Area in order to achieve a national average performance. The suggestion is absurd, and even if Burbank claims it would not protest such appointment(s), it cannot control the actions of other dealers within the 10-mile relevant market area, as set forth in Vehicle Code sections 507 and 3062, which could protest.


IV. CONCLUSION

Protestant has failed to meet its material contractual responsibilities to maintain adequate financing to run its business, to stock and sell Kawasaki Products, and to positively promote Kawasaki products and Kawasaki's reputation in the market place. Protestant has now admitted that its lack of financing and inventory are not the cause of any loss of sales. For any or all of these reasons, the premise on which this hearing was directed has been shown to be false, and Kawasaki has good cause under Section 3061 to terminate Protestant's Kawasaki Dealer Agreement. The Board should now adopt Judge Prod original Order.

However, if the Board issues a conditional decision despite the evidence that was submitted during both merits hearings, any conditions that the Board may place on its decision, however, must reflect the contractual obligations that already exist between the parties as set forth in testimony given at hearing: \$885,219 in flooring, two weeks to obtain it, 116 motorcycles and 2 ATVs in inventory and sales of 232 motorcycles and 5 ATVs annually. Any other requirements are beyond the scope of the Board's power to grant and are unfair to the other Kawasaki dealers whose requirements are uniformly calculated and applied.

Dated: October 17, 2013

BAKER & HOSTETLER LLP
MAURICE SANCHEZ
KEVIN M. COLTON


Maurice Sanchez
Attorneys for Respondent
Kawasaki Motors Corp., U.S.A.

PROOF OF SERVICE

I, Lorraine Moore, declare:

I am employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 600 Anton Boulevard, Suite 900, Costa Mesa, California 92626-7221. On October 17, 2013, I served a copy of the within document(s):

**RESPONDENT KAWASAKI MOTORS CORP., U.S.A.'S
POST-HEARING BRIEF ON REMAND [REDACTED TO
REFLECT INFORMATION UNDER SEAL]**

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. and the transmission was reported as complete and without error.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Costa Mesa, California addressed as set forth below.
- ☐ by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.
- ☐ following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ by transmitting via electronic mail the document(s) listed above to the e-mail address(es) set forth below on this date before 5:00 p.m. and the transmission was reported as complete and without error.

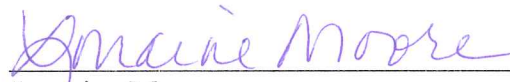
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BURBANK KAWASAKI INC.

1 I am readily familiar with the firm's practice of collection and processing correspondence
2 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
3 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
4 motion of the party served, service is presumed invalid if postal cancellation date or postage
5 meter date is more than one day after date of deposit for mailing in affidavit.

6 I declare under penalty of perjury under the laws of the State of California that the above
7 is true and correct.

8 Executed on October 17, 2013, at Costa Mesa, California.

9
10 
11 Lorraine Moore